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February 20, 2014

By ECF

The Honorable Debra Freeman
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: *Dodona I, LLC v. Goldman, Sachs & Co., et al.*, 10 Civ. 7497 (VM)(DCF) (S.D.N.Y.)

Dear Judge Freeman:

We represent lead plaintiff Dodona I, LLC ("Plaintiff") and the class. On Feb. 18, 2014, defendants Goldman, Sachs & Co., *et al.* (collectively, "Defendants") submitted a letter to Judge Marrero seeking to extend the deadline for the filing of summary judgment motions until 21 days after class members may opt out of, or enter separate appearances in, this litigation -- *i.e.*, for an indeterminate period of months or more. By order filed the following day, Judge Marrero directed Defendants to address this matter to Your Honor (Dkt. 139). By facsimile today, Defendants sent to Your Honor a copy of Judge Marrero's order and Defendants' Feb. 18 letter (Dkt. 139). For the reasons that follow, the Court should deny Defendants' request.

Extending the deadline for summary judgment motions would disserve the interests of absent class members Defendants purport to protect, based purely on speculation, and would result in unfair delay. As an initial matter, while Rule 23(c)(2)(B) directs that notice must be given to absent class members, Defendants are incorrect that such notice must "*now* … be provided" (Defs' letter at 2) (emphasis added). To the contrary, Defendants omit both that the Court retains discretion as to the timing of notice and further that where, as here, a Fed. R. Civ. P. 23(f) petition is pending, the district court "should ordinarily stay the dissemination of class notice …." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.28 (2014).[1] *Accord* 7AA WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1788 ("the court has great discretion and flexibility in determining what is the best notice procedure to utilize under the circumstances

[1] By order filed Jan. 23, 2014, Judge Marrero certified the class in this litigation. *See Dodona I, LLC v. Goldman, Sachs & Co., et al.*, --- F.R.D. ---, 2014 WL 300723, 2014 U.S. Dist. LEXIS 9681 (S.D.N.Y. Jan. 23, 2014). On Feb. 7, 2014, Defendants filed a petition for review of that ruling in the U.S. Court of Appeals for the Second Circuit. *See Dodona I, LLC v. Goldman, Sachs & Co., et al.*, Dkt. 14-419 (2d Cir. Feb. 7, 2014). Plaintiff filed its opposition to Defendants' Rule 23(f) petition on Feb. 18, 2014. *Id.* at Dkt. 10. Defendants' petition remains pending in the Second Circuit.

of the case at hand"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 286 F.R.D. 88, 94 (D.D.C. 2012) (staying class notice until after court of appeals has acted on Rule 23(f) petition). Here, in addition, several other reasons militate against extending the deadline for summary judgment motions.

First, Defendants admit in their letter (at p.3 n.4) that they "intend to move for summary judgment on issues common to all class members and issues directed at various individual class members." Therefore, contrary to Defendants' position that class members will be deprived of their right to enter separate appearances or respond individually, class members will indisputably be more informed if class notice follows, rather than precedes, the filing of Defendants' summary judgment motions. The notice can then also advise class members concerning relevant aspects of Defendants' summary judgment motions. At the same time, Defendants state (at p.4) that "[a]ll discovery in the case–fact and expert–has been completed" (although they omit that Goldman still must produce certain agreed-upon Rule 30(b)(6) witnesses, among other things), and that they have already developed their evidence and their arguments concerning summary judgment. Thus, Defendants neither do nor could reasonably claim that *they* would be prejudiced by adhering to the long-established March 3, 2014 deadline to move for summary judgment.[2]

Second, Defendants' position ignores that, as recognized in one of the very cases they cite, the Court may defer ruling on any summary judgment motions "until after class definition issues are settled, notice has been given, and the period for class members to exclude themselves has expired …." *Gomez v. Rossi Concrete Inc.*, 2011 WL 666888, at *1 (S.D. Cal. Feb. 17, 2011). However, deferring a ruling on summary judgment pending notice to the class does not mean that the filing of summary judgment motions should be delayed, or that Defendants should be able to use any such delay to re-litigate class certification issues. To the contrary, Plaintiff seeks only to hold Defendants to the existing schedule so that the case may be ready for trial subject to the Court's ruling on summary judgment. Along these lines, Defendants' letter states (at p.3) (emphasis added) that "[r]equiring briefing of summary judgment motions *on the current schedule* would deprive [absent class member] entities of their rights" but omits that Your Honor's current Scheduling Order (Dkt. 126 at § 8(b)) does not establish any such briefing schedule, and instead requires that the parties "meet and confer regarding a briefing schedule." More fundamentally, Defendants' position is at odds with itself. If Defendants' goal really is to enable class members "to appear in the Action and respond through their own counsel to issues

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[2] *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995), the sole case Defendants cite, is not to the contrary, but instead involved a motion by defendants for an order directing the distribution of notice to the class "[a]lmost six months after the" district court granted defendants summary judgment. In fact, the Ninth Circuit explicitly recognized there that "the history, purpose, and language of Rule 23(c)(2) indicate that it only contemplates notification of the class *before* a final judgment has been rendered on the merits[.]" *Id.* at 296.

in summary judgment motions directed at them individually, or to opt out of the Action entirely" as they state (at p.3), that clearly counsels in favor of summary judgment motions being filed before, not after, the class notice process.

In the circumstances, Defendants' "one-way intervention" argument is as inapt as it would be if made at the motion to dismiss stage, where a court's ruling may similarly impact class member rights. Defendants cite no case, either in this Circuit or otherwise, supporting the rule that they apparently advocate here – namely, that the filing of summary judgment motions should be deferred until after completion of the Rule 23 notice process to the class in cases where a class has been certified.[3]

Finally, Defendants' speculation regarding what class members may or may not do provides no basis to extend the summary judgment schedule, and none of the cases Defendants cite suggests, let alone holds, otherwise. This litigation was filed in September 2010. Fact and expert discovery is substantially complete; the Second Circuit will rule in due course on Defendants' Rule 23(f) petition; and, as Defendants acknowledge, summary judgment is the final pre-trial phase of this case. If the Defendants have a specific conflict with the March 3, 2014 deadline, Plaintiff will not oppose a short extension to that deadline and have previously accorded such courtesies to Defendants' prior requests for extensions. However, Defendants make no showing that delaying summary judgment indefinitely is required to serve any of *their* own interests, and any such delay, particularly of the magnitude Defendants request, will prejudice Plaintiff's ability to fairly prosecute this case for the class it represents.

Respectfully submitted,

Merrill G. Davidoff
Lawrence J. Lederer

MGD/LJL:ss
cc by ECF and email: All counsel of record

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[3] The two cases Defendants do cite, *Kerkhof v. MCI Worldcom, Inc.*, 282 F.3d 44, 54-55 (1st Cir. 2002) and *Philip Morris Inc. v. Nat'l Asbestos Workers Med. Fund*, 214 F.3d 132, 135 (2d Cir. 2000), are not to the contrary and are distinguishable. *Kerkhof*, 282 F.3d at 48, involved a request by the plaintiff to certify a class "post-summary judgment" and *Phillip Morris*, 214 F.3d at 135, did not even involve summary judgment, but instead the district court's alleged failure to issue its ruling on class certification "in the face of repeated requests by the petitioner and with trial imminent."